Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

ALBERT J. AVENAL, JR., et al.,
Petitioners,

– against –

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ*
DANIELA KLARE ELLIOTT
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009

* Counsel of Record

Attorneys for Petitioners

ALAN M. DERSHOWITZ
PHILIP F. COSSICH, JR.
SCOTT LABARRE
MICHAEL X. ST. MARTIN
CAROLYN A. MCNABB

QUESTIONS PRESENTED FOR REVIEW

1. Whether the taking, through State action, of a property interest premised on a leasehold interest granted by the State for use of State land is properly assessed through: 1) this Court's traditional physical taking analysis, or 2) this Court's regulatory taking analysis, or 3) whether this Court should articulate a new hybrid analysis.

2. Whether, if a regulatory taking analysis is appropriate, the State can override its obligation to pay just compensation under the Fifth Amendment by expanding its "police power" and the "background principles" of the State's "law of property and nuisance."

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to the proceeding below are: Albert J. Avenal, Jr., Anthony Barthelemy, Chris P. Barthelemy, Gary Barthelemy, Anna Butscher Buras, Anna Bessie Bodden Buras, Neal Buras, Ralph J. Buras, Ralph J. Buras, Jr., Richard Buras, Donald J. Campo, Jr., Donald P. Campo, Ernest Campo, Mathilda Guerra Campo, Estate of Tony Campo, Anna Cibilich, Pero Cibilich, Richard H. Clark, Crescent Oysters, Inc., Irvin Cross, Estate of Joseph Cross, Melvin Cross, Clarence R. Duplessis, Clarence R. Duplessis, Jr., Arthur Encalade, Carliss J. Encalade, Estate of Joseph Encalade, Stanley Encalade, Encalade Seafood, Inc., M.J. Farac, M.J. Farac, Jr., Maja Farac, Sinajka Farac, Ann P. Fox, Calvin R. Fox, Calvin R. Fox, Jr., Dale E. Fox, Gene L. Fox, Justin Ryan Fox, Kenneth A. Fox, Kenneth Ryan Fox, Marie O. Fox, Rachel Fox, Rhonda Fox, Rodney Fox, Jr., Rodney L. Fox, Ross Louis Fox, Fox Industries, Fox Oyster Co., Inc., Fox Seafoods, Inc., Estate of M.J. Franicevich, Estate of Frank Ganier, Abraham J. Harness, Nathan G. Harvey, Laurie A. Duplessis Holiday, Herman Isadore, Jr., J & P Oysters, Inc., Estate of Mayo P. Jones, Jr., Robert M. Keenan, Donald J. Kennair, Jr., Joseph Labruzzo, Arthur L. Lafrance, Joey G. Latapie, Clifford Lebouef, Jean Lebouef, Lindy Lebouef, Lorne Lebouef, Ante Lepetich, Mato Lepetich, John Martinez, Mederic R. Meyer, Matthew David Meyers, Mitchel Meyers, Cladmon Narcisse, Felix Narcisse, Oliver B. Narcisse, Nicolae Nitica, Richard Patterson, Pean, Inc., Ivo N. Popich, Anton N. Popich, Arthur A. Reddick, Adam R. Serigne, Lionel R. Serigne, O'Niel N. Serigne, Phillip H. Simmons, Helen T. Skansi, Nick L. Skansi, Frank Slavich, Jr., Taco, Inc., Ann S. Tesvich, Frances Lynn Tesvich, Ivo A. Tesvich, John A. Tesvich, Kuzma I. Tesvich, Jr., Estate of Kuzma J. Tesvich, Lisa K. Tesvich, Maria Tesvich, Nedo Tesvich, Peter J. Tesvich, Peter L. Tesvich, Tesvich Oysters, Inc., Charlie Thompson, Steve Thompson, Joseph Tinson, and Nikola Ante Vekic.

The class action representatives, Albert Avenal, Jr., Clarence Duplessis, Kenneth Fox, Fox Oyster Company and Nick Skansi were appellants in the proceedings before the Louisiana Supreme Court.

There are no parent or publicly held corporations owning 10% or more of the stock of any named corporate party.

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OPINIONS BELOW

The opinion of the Louisiana Supreme Court is reported at 886 So.2d 1085 (La. 2004), and is set forth at App. 1. The order denying petitioner's petition for rehearing and rehearing en banc is set forth at App. 64.

JURISDICTION

The opinion of the Louisiana Supreme Court was entered on October 19, 2004. (App. 1) Petitioner's timely filed petition for rehearing and for rehearing en banc was denied on December 10, 2004. (App. 64) This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> * * * nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This Petition raises two important constitutional questions stemming from the State of Louisiana's elimination of petitioners' leasehold property interests in the water bottoms of Breton Sound Basin, Louisiana. The petitioners in this action are Louisiana oystermen who held unexpired leasehold interests in certain underwater acreage of Breton Sound, which gave them exclusive use of those water bottoms to cultivate and harvest oysters, with a statutory right of renewal so long as the leases were capable of supporting oyster populations. The functional use of petitioners' leaseholds has been eliminated by State action.

In March, 1994, petitioners filed a class action suit against the State of Louisiana asserting the destruction of their property and seeking the value of their oyster leases as a result of the intrusion of fresh water from the State's freshwater diversion project, which diluted the salinity levels in Breton Sound below that level capable of sustaining oyster production. That action asserted a taking in violation of both the State and Federal constitutions. The jury found in favor of petitioners and awarded damages. On October 19, 2004, the Louisiana Supreme Court reversed, expressly rejecting petitioners' claims of a Fifth Amendment taking that warranted compensation. (App. 45-47) On December 10, 2004, that court denied the timely filed petition for rehearing. (App. 64)

This Petition addresses two issues arising from this Court's bifurcated approach to claims of a compensable taking under the Fifth Amendment's Just Compensation Clause. The first is whether the taking, through State action, of a property interest premised on a leasehold interest granted by the State for use of State land is properly assessed through: 1) this Court's traditional physical takings analysis, or 2) this Court's regulatory taking analysis, or 3) whether this Court should articulate a new hybrid analysis. Second, it raises the question whether, if a regulatory taking analysis is appropriate, can the State, by expanding its "police power" and the "background principles" of the State's "law of property and nuisance," override its obligation to pay just compensation under the Fifth Amendment.

In this case, petitioners entered into long-term leases with the State of Louisiana that granted them the exclusive right to use the water bottoms to cultivate and operate oyster beds in Breton Sound. The property rights of an oyster lessee are defined by State statute as having "exclusive use of the water bottoms leased and of all oysters and cultch grown or placed

thereon. . . ." La. R.S. 56:423(A).[1] Further, the State was under a statutory obligation to renew the oyster farmers' leases, provided the leases were "capable of supporting oyster populations." La. R.S. 56:428(A). Once they obtained the leases, some of which dated back to the early 1900's, petitioners expended significant effort and capital to maintain, improve and cultivate the oyster beds.

In an abrupt change in policy, in or about September, 1991, the State began to operate the Caernarvon Freshwater Diversion Structure ("Caernarvon") as part of the State's efforts to promote coastal restoration and wetland protection. Because the Caernarvon operation diverted fresh water from the Mississippi River into Breton Sound, the area containing petitioners' oyster beds was heavily infused with fresh water, and the salinity levels of Breton Sound were drastically diluted, rendering petitioners' leasehold areas too fresh for oyster cultivation.

In 1994, petitioners brought a class action suit against the State of Louisiana seeking compensation for the elimination of the value of their oyster leases as a result of the intrusion of fresh water from the State's operation of the Caernarvon project. After an eight-day trial, the jury's verdict in favor of the class representatives found that "the state has taken actions which have taken or damaged [the petitioners'] right to property." (App. 17-18) It awarded damages which resulted in a judgment of $21,345.00 per acre of oyster growing water bottoms. Thereafter, the Louisiana Supreme Court reversed, and rejected petitioners' claims that the State's action constituted a compensable taking under the Fifth Amendment. (App. 1, 45-47)

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[1] "Cultch" is the material laid down on oyster grounds to furnish a point of attachment for young oysters.

On appeal, petitioners argued that the State's destruction of the value of the leases by the diversion of fresh water into Breton Sound was a compensable taking under the Fifth Amendment. The Louisiana Supreme Court disagreed, deeming the State's action in flooding Breton Sound with fresh water a regulatory taking, and applying the three-part test set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). The Louisiana Supreme Court concluded that petitioners were aware of plans for the Caernarvon project, and determined that they could not have held "reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments." (App. 45) On rehearing, petitioners challenged that finding as not supported by the record.

The Louisiana Supreme Court also held that even if the State's actions herein deprived petitioners of all economically beneficial and productive use of their property, under a regulatory taking analysis, because Louisiana was applying its police power and acting in accordance with "a background principle of [Louisiana]'s property law," no compensation need be paid. (App. 46)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT OVER HOW TO ASSESS THE DESTRUCTION OF THE VALUE OF PROPERTY HELD UNDER A LEASE UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The first question posed by this Petition is whether, under the Just Compensation Clause of the Fifth Amendment, petitioners are entitled to compensation for the value of their leasehold interests, whose functional use was eliminated as a

result of the State of Louisiana's operation of the Caernarvon Freshwater Diversion Structure.

Under a long line of this Court's cases addressing physical takings, the answer to this question is a resounding yes. According to the Louisiana Supreme Court, which applied a second line of this Court's cases responding to regulatory takings, the answer is no. This Court should grant certiorari to reconcile these two lines of cases and to establish which body of law applies to the simple and recurring problem raised by this case.

As the fluidity of the real estate market encourages and compels the development of non-traditional, sectionalized property holding and use arrangements, the question of how such holdings should be treated when they are taken by State action is a real and present question. Because this Court's jurisprudence developed along the distinction as to *how* the property came to be taken – i.e., physical takings versus regulatory limitations – takings of property interests that do not fit cleanly into these two categories receive disparate treatment, depending on how the State action is characterized. This Court should resolve the open question of whether compensation is due a leaseholder whose property interest is stripped of any functional use by State action.

A. Physical Taking Cases

Petitioners' claims of compensation are virtually identical to those raised and decided in Alamo Land & Cattle Co., Inc., v. Arizona, 424 U.S. 295 (1976). There, the State of Arizona leased certain lands to petitioner Alamo; under the parties' ten-year lease, petitioner was permitted to use the lands solely for grazing in connection with its cattle ranch. 424 U.S. at 298-99. After the federal government claimed the land in connection with the establishment of a flood control dam and reservoir, the district court awarded Alamo monies for its "leasehold interest at the time of taking, and its reasonable prospective leasehold

interest." Id. at 300. In upholding the award of compensation, this Court acknowledged the long-standing rule that a leaseholder is entitled to compensation after a taking:

> [T]he holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.

Alamo, 424 U.S. 295 at 303. Because it was unclear whether Arizona had authority to grant the lease in the first instance, the Court remanded for such factual determinations under the specific terms of state law and the applicable leases.

Alamo is virtually indistinguishable from the present case, also involving an unexpired leasehold interest granting a right to a particular use of the land's surface, and where, similarly, the functional use of the property interest was eliminated through State action. Accordingly, pursuant to Alamo, when the State eliminated the functional use of petitioners' leasehold interests in the water bottoms, it became obligated to pay compensation.

Moreover, that reasoning is consistent with this Court's traditional jurisprudence that deems a compensable taking to have occurred where the government appropriates private property for public use – as opposed to imposing a limitation on use through regulatory control. The Court recently reiterated that standard:

> When the government physically takes possession of an interest in property for some public purpose,

> it has a categorical duty to compensate the former owner, United States v. Pewee Coal Co., 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); or when its planes use private airspace to approach a government airport, United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), it is required to pay for that share no matter how small.

Tahoe-Sierra Preserv. v. Tahoe Reg. Planning, 535 U.S. 302, 322 (2002). In United States v. Pewee Coal Co., 341 U.S. 114 (1951), the Court found that petitioner, a coal mine operator, was entitled to just compensation when the government took over

operation of coal mines on his leased land. Compensation for the physical taking of a leasehold interest was also awarded in United States v. General Motors Corp., 323 U.S. 373 (1945), where petitioner corporation owned a 20-year lease on a warehouse building in Chicago that was occupied for a period of time by the government under the Second War Powers Act, and in United States v. Petty Motor Co., 327 U.S. 372 (1946), where tenants were displaced by the government when it took over a building in Salt Lake City under the same War Powers Act.

Thus, where the government physically takes possession of the property interest, there is no inquiry into whether the appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use; as a categorical rule, it must pay for that share, no matter how small. Tahoe, 535 U.S. at 322-23.

Finally, this Court has recognized that destruction of property is equivalent to a physical occupation. In General Motors Corp., supra, where the lessee had customized the warehouse space to fit its manufacturing needs and those customized fixtures were removed or destroyed by the government in the course of its use, the Court deemed the lessee's interest in those fixtures to be as much "property" as its interest in the land, and held that the government's destruction of those customized fixtures constituted an additional loss of a compensable interest:

> For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon

> erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking.

General Motors, 323 U.S. 373 at 383-84. (Emphasis supplied.) Just as the government was obligated to compensate General Motors for the destruction of its trade fixtures in the course of the government's occupation of that leased property, so too it should bear the obligation to compensate petitioners for the oyster beds they developed on the leased water bottoms that were destroyed by the government in the course of its operation of the freshwater diversion structure.

B. Regulatory Taking Cases

This Court has also recognized that a compensable Fifth Amendment taking can occur through enactment of regulations that impose limitations on private use of property; in those cases, the takings analysis is structured along an entirely different framework. Having "generally eschewed" a set formula, the Court instead relies on ad hoc, factual inquiries, guided by multiple factors: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). See also Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (regulation prohibiting construction on salt marshes affected petitioner's property but even after regulation, petitioner retained significant value; remand for application of Penn Central analysis); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

Although the State of Louisiana's action in diverting the Mississippi's freshwater stream into Breton Sound – to achieve

a public benefit whose burden was improperly shouldered by the petitioners alone – bore all the hallmarks of a physical taking like that in Alamo, the Louisiana Supreme Court relied on this Court's line of regulatory takings cases to reach the opposite conclusion: that petitioners had no right to compensation. In effect, the Louisiana Supreme Court read Penn Central/Palazzolo/Lucas as overruling Pewee/General Motors/Alamo. The Court should grant certiorari to clarify whether the Louisiana Supreme Court is correctly reading this Court's precedents.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER ITS PRECEDENTS ALLOW A STATE TO EXPAND ITS READING OF ITS POLICE POWERS AND/OR THE "BACKGROUND PRINCIPLES" OF THE STATE'S "LAW OF PROPERTY AND NUISANCE" TO CIRCUMVENT THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The regulatory cases recognize two exceptions to the three-step Penn Central analysis: those situations where the regulation involves a "permanent physical occupation" of property, see, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982) (government appropriated part of a rooftop in order to provide cable TV access for apartment tenants; Court held that a taking occurs where the "character of governmental action" is a permanent physical occupation); and where a regulation denies all economically beneficial or productive use of land. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (Fifth Amendment is violated where a land-use regulation "denies an owner economically viable use of his land."); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992) (recognizing two exceptions). Those exceptions should theoretically make it unnecessary to decide whether the Fifth Amendment mandates compensation here because the leasehold terminations involved should be characterized as

physical takings, or because they should be considered regulatory takings subject to analysis under one of the exceptions.

The Louisiana Supreme Court recognized the holding in Lucas as to the principles underlying the exceptions. However, it opined that Lucas was inapplicable to the petitioners' claims because, it found, Lucas recognizes an exemption from the "just compensation" requirement where the State action is "undertaken in the exercise of the state's police power," or "in accordance with a 'background principle' of the State's property law." (App. 46). The court found that Louisiana's operation of Caernarvon fit under both exemptions, deeming it both "a valid exercise of the state's police power under federal law," and activated in accordance with the background principles of Louisiana law. (App. 46-47).

That reading was wrong. Lucas did not hold that compensation is never required when a State regulation renders property economically useless, simply because the State claims to be exercising its police power. If that were the case, as the Lucas Court appreciated, there would almost never be a requirement of compensation. To the contrary, Lucas noted that compensation is not mandated when the State law protects against an actual nuisance (or "noxious" or "harmful" use of the property), or when the property owner's use was "not part of his title to begin with." 505 U.S. at 1026-27. Since neither of those limitations applied here, under Lucas, there was a taking requiring compensation.

In addition, the Louisiana Court completely misread Justice Scalia's reference to "the background principles of state law of property and nuisance" in the land-use regulation area. Id. at 1029. Notably, the Louisiana court omitted the "and nuisance" component of that reference, and thus relied improperly on an overly broad interpretation of the exception as Justice Scalia articulated it. Instead, in the proper context, the pertinent question is whether the property owner ever had the

right to use his land in the way he asserts is being taken away – for example, a landowner does not have the right to use his land noxiously, and therefore a regulation preventing noxious use is not compensable. Here, by contrast, there was no improper use of the property by the petitioners; rather, the State took away petitioners' legitimate right to use and occupy the leaseholders' interest in the property.

Certiorari should thus be granted to address whether a State can expansively read its "police power" or its "background principles of the State law of property and nuisance" so as to eviscerate the Fifth Amendment's Just Compensation requirements.

CONCLUSION

This Petition raises two important constitutional issues about which the law is in conflict. The Petition for a Writ of Certiorari should be granted.

March 1, 2005

Respectfully submitted,

Nathan Z. Dershowitz*
Daniela Klare Elliott
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue
Suite 300
New York, NY 10001
(212) 889-4009

* COUNSEL OF RECORD

Alan M. Dershowitz
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187

Philip F. Cossich, Jr.
Cossich, Sumich & Parsiola, LLC
8056 Highway 23
Suite 200
Post Office Box 400
Belle Chasse, LA 70037
(504) 394-9000

Scott LaBarre
Scott LaBarre, LLC
3500 North Hullen Street
Metairie, LA 70002
(504) 456-8640

Michael X. St. Martin
St. Martin & Williams
4084 Highway 311
Houma, LA 70361-2017
(800) 256-1533

Carolyn A. McNabb
Attorney at Law
254 Barrow Street
Houma, LA 70360
(985) 851-2533